Dated: March 15 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-30629
	)	
Iesha T. Chapman,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3144
	)	
State Farm Fire & Casualty Company,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Iesha T. Chapman,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

State Farm Fire & Casualty Company ("Plaintiff") is before the court on the Plaintiff's Motion for Summary Judgment ("Motion"). The Motion asserts that a state court criminal conviction should be given collateral estoppel effect in Plaintiff's dischargeability action against Defendant Iesha T. Chapman, the Debtor ("Debtor") in the underlying Chapter 7 bankruptcy case. After

reviewing the Motion and supporting brief, the response thereto filed by Debtor, Plaintiff's reply, and the criminal judgment upon which the Motion is based, the court will deny the motion.

MATERIAL FACTS

On July 16, 2003, Debtor was driving a motor vehicle that struck a pedestrian, Laketisha Floyd, Complaint ¶ 4; Answer ¶ 4, who was insured by Plaintiff, Complaint ¶ 3, Answer ¶ 1. Debtor was convicted of attempting to commit felonious assault, in violation of O.R.C. §§ 2923.02 and 2903.11(A)(1), in connection with the incident. Debtor alleges that the conviction was entered by the Lucas County, Ohio Court of Common Please on January 8, 2004, based on her plea of no contest.[1] On February 13, 2004, Debtor was sentenced to three years of probation.

On February 1, 2005, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Her schedule of Creditors Holding Unsecured Nonpriority Claims listed an unliquidated, disputed debt to Plaintiff in the amount of $76,000.00. On May 20, 2005, Plaintiff filed the complaint initiating this adversary proceeding, which alleged that Debtor acted willfully and maliciously in injuring Plaintiff's insured, so that the liability therefor is nondischargeable under 11 U.S.C. § 523(a)(6). The complaint also alleges that Plaintiff is the successor in interest to the insured by subrogation to the extent of $55,000.00.

The only evidence submitted in support of the Motion is a certified copy of the judgment imposing sentence against Debtor in the state court criminal prosecution.

LAW AND ANALYSIS

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88

[1] Although neither party has provided the court with documents evidencing either the conviction or the plea, Plaintiff's reply does not dispute that the conviction was based on a "no contest" plea.

(1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [it] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. § 523(a)(6). In order to be entitled to a judgment that the debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). In *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998), the Supreme Court held that finding nondischargeability of a debt under § 523(a)(6) "takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Geiger*, 523 U.S. at 61. The Supreme Court further stated that

> the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences of an act," not simply, "the act itself*."

Geiger, 523 U.S. at 61-62 (alteration in original)(citing Restatement (Second) of Torts §8A cmt.a (1964)). A willful injury occurs when "(i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (citing *Markowitz*, 190 F.3d at 464). Under § 523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986).

Plaintiff has not shown that Debtor's criminal conviction establishes the applicability of 11 U.S.C. § 523(a)(6) as a matter of law. The issue of nondischargeability is a matter of federal law

governed by the Bankruptcy Code. *Grogan v. Garner*, 498 U.S. 279, 284, 111 S. Ct. 654, 658-59 (1991). However, "collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)." *Id.* 498 U.S. at 285 n.11; *accord, e.g.*, *Rally Hill Productions, Inc. v. Bursack (In re Bursack)*, 65 F.3d 51, 53 (6th Cir. 1995). When a state court enters a judgment against a debtor prepetition, the bankruptcy court must give collateral estoppel effect to "those elements of the claim that are identical to the elements required for discharge and which were actually litigated and determined in the prior action." *Grogan*, 498 U.S. at 284. The principles of 28 U.S.C. § 1738, the federal Full Faith and Credit Act, require federal courts to give a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered. *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703 (6th Cir. 1999). "Bankruptcy courts' exclusive jurisdiction over dischargeability issues does not alter this rule." *Bursack*, 65 F.3d at 53 (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984)). This court must therefore apply Ohio issue preclusion principles in deciding the Motion.

Under Ohio law, there are four elements of the doctrine of collateral estoppel, or issue preclusion, which is the preferred terminology of the Ohio courts: (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (6th Cir. B.A.P. 2002). "Issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action." *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 217, 685 N.E.2d 529, 533 (1997).

Plaintiff argues that the federal trend as well as the law of many states is to give preclusive effect to criminal convictions in subsequent civil proceedings. But the law of Ohio controls in this case, and Ohio courts generally refuse to give preclusive effect to criminal convictions in subsequent civil proceedings. *Phillips v. Rayburn*, 113 Ohio App. 3d 374, 381-82, 680 N.E.2d 1279 (1996); *Manley v. Rufus Club Mozambique, Inc.*, 111 Ohio App.3d 260, 263, 675 N.E.2d 1342 (1996); *see also Walden v. Ohio*, 47 Ohio St. 3d 47, 51-52, 547 N.E.2d . 962, 965-66 (1989). As a result federal courts applying Ohio law under the Full Faith and Credit Act, including bankruptcy courts in dischargeability actions, have likewise refused to give preclusive effect to criminal

convictions in subsequent civil proceedings. *Culberson v. Doan*, 72 F. Supp. 2d 865, 872-73 (S.D. Ohio 1999); *Bukowski v. Hall*, 165 F. Supp. 2d 674, 678-79 (N.D. Ohio 2001); *Breckler v. Martin*, 2002 U.S. Dist. LEXIS 12330 (N.D. Ohio June 10, 2002); *Clark v. N. Am. Science Assocs., Inc.(In re Clark)*, 222 B.R. 114, 117 (Bankr. N.D. Ohio 1997); *Grange Mutual Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 905 (Bankr. N.D. Ohio 1998).

Ohio courts identify two reasons for refusing to give criminal convictions preclusive effect in subsequent civil proceedings. These reasons resonate in this case. First, Ohio courts generally adhere to the mutuality requirement in applying principles of preclusion. Unless all parties to the subsequent proceeding were bound by the prior judgment, collateral estoppel is inappropriate. *Goodson v. McDonough Power Equip., Inc*., 2 Ohio St.3d 193, 195, 443 N.E.2d 978, 981 (1983). While the Ohio Supreme Court has made exceptions to this requirement, it has not been overruled and there is no basis shown for an exception in this case. Plaintiff was not a party to or in privity with a party to the criminal proceeding against Debtor, and would not have been bound by its outcome had there been a trial and an acquittal. *Phillips*, 113 Ohio App. 3d at 380, 680 N.E.2d at 1283; *Clark*, 222 B.R. at 117; *see Manley*, 111 Ohio App.3d at 263, 675 N.E.2d at 1344 (holding that trial court erred in finding that the plaintiff and the State of Ohio were in privity for purposes of res judicata). Hence, there is no mutuality under Ohio law.

Second, even though the burden of proof is higher in criminal proceedings than in civil proceedings, Ohio courts find that the many substantive and procedural differences between civil actions and criminal actions make issue preclusion inappropriate. *Walden*, 47 Ohio St.3d 47, 52. Those differences are of particular concern to this court in this case where Debtor's conviction apparently arose from a plea of no contest and not a trial.

Were Ohio courts generally inclined to afford preclusive effect to criminal convictions in subsequent civil actions, two other elements necessary for issue preclusion are still missing in this action. In the cases cited above, some of the criminal convictions clearly resulted from a trial, and Ohio courts and federal courts applying Ohio law still refused to give them collateral estoppel effect. *E.g.*, *Phillips*, 113 Ohio App. 3d at 380, 680 N.E.2d at 1283; *Culberson*, 72 F. Supp. at 868. Since Debtor's conviction apparently occurred after a plea of no contest, it does not appear that there were any issues actually litigated in the criminal proceeding. There was no trial. And even when a conviction based on a guilty plea instead of a trial may be given collateral estoppel effect,

compare, *e.g.*, *Mitchell v. Mut. Life Ins. Co. (In re Mitchell)*, 129 F.3d 1264 (6th Cir. 1997) (unreported table decision), *available at* 1997 WL 693437, at **1 (Illinois guilty plea satisfies prerequisites to application of collateral estoppel in nondischargeability proceeding) (citing *Appley v. West*, 832 F.2d 1021, 1026 (7th Cir. 1987)); *see Mitchell v. Mitchell (In re Mitchell)*, 256 B.R. 256, 258 (Bankr. N.D. Ohio 2000) (guilty plea is admission of elements of crime), *with Chapman*, 228 B.R. at 905; *Clark* , 222 B.R. at 117 (Bankr. N.D. Ohio 1997), a conviction based on a plea of no contest will still not be given collateral estoppel effect, *see, e.g.*, *Raiford v. Abney (In re Raiford)*, 695 F.2d 521, 523 (11th Cir. 1983); *see also, e.g.*, *Vogel v. Kalita (In re Kalita)*, 202 B.R. 889, 896-98 (Bankr. W.D. Mich. 1996) (plea of nolo contendere does not give rise to collateral estoppel because no issues were actually litigated).[2] Plaintiff has not met its burden of showing that any issues were actually and necessarily litigated in the state court proceeding as a predicate to applying issue preclusion in this action.

Another reason the court must deny the Motion is that Plaintiff has not shown any identity of issues between the two proceedings. Even assuming the criminal conviction may be afforded preclusive effect and even assuming that the intent required for a conviction for felonious assault is the same as that required for nondischargeability under 11 U.S.C. § 523(a)(6), *see Chapman*, 228 B.R. at 905 (felonious assault under Ohio statute does not require finding of malice), Debtor was not convicted of felonious assault but was convicted of *attempt* to commit felonious assault. Thus, the state court has not made any finding that Debtor did, in fact, commit an action falling within the scope of § 523(a)(6). Ohio law defines "attempt" as "purposely or knowingly . . . engag[ing] in conduct that, if successful, would constitute or result in the offense." O.R.C. § 2923.02(A). Accordingly, one may be convicted of attempt in Ohio even if the conduct was not successful, and so a conviction for attempt cannot establish that the conduct was successful. Debtor's conviction of attempted felonious assault does not, therefore, establish as a matter of law that she injured Plaintiff's insured – only that she tried to do so. *See also Am. Nat'l Bank & Trust Co. v. Cooper (In re Cooper)*, 125 B.R. 777, 781 (Bankr. N.D. Ill. 1991).

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[2] Plaintiff's reply argues that its assertion of collateral estoppel is not based on the plea itself, but on "the *finding* of guilt by the Lucas County Court of Common Pleas." However, the criminal judgment – the only document submitted in support of the motion for summary judgment – does not find that Debtor is guilty of the crime but only that she has been convicted of it.

Although the conviction is not conclusive under Ohio law, it is still evidence that may be "accorded whatever weight the factfinder deems appropriate." *Phillips*, 113 Ohio App. 3d at 381-82, 680 N.E.2d at 1283. The state court judgment imposing sentence does not recite what happened between Plaintiff's insured and Debtor. There is nothing in this document from which the court can find that Debtor intended to injure Plaintiff's insured, not just that Debtor committed some intentional act that resulted in injury to Plaintiff's insured. Indeed, the present record lacks evidence of injury to Plaintiff's insured. Plaintiff has not met its initial burden of showing no genuine issues of material fact just with the submission of this document. "Without more evidence to show an absence of genuine issues of material fact than just the criminal conviction, the plaintiff's motion for summary judgment on this issue fails." *Bukowski*, 165 F. Supp. at 679.[3]

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment [Doc. #12] is denied; and

IT IS FURTHER ORDERED that a further pretrial scheduling conference under Fed. R. Civ. P. 16(a) and Fed. R. Bankr. P. 7016 will be held on **April 25, 2006, at 10:45 o'clock a.m.**

[3] The court does not hold that Debtor's liability to Plaintiff's insured is not nondischargeable under § 523(a)(6), but only that the criminal conviction does not *per se* establish nondischargeability.